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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No 73-1213

OLIVER R. GRACE, THE GREEN FUND, INC., S. WILLIAM GREEN, EVELYN GREEN and CYNTHIA COLIN, as Executors of the Estate of LOUIS A. GREEN, deceased, EVELYN GREEN and ELBRIDGE SMITH, individually and as stockholders of AMERICAN-HAWAIIAN STEAMSHIP COMPANY in behalf of themselves and of said corporation, and LEVENTRITT LEWITTES & BENDER,

Petitioners,

against

DANIEL K. LUDWIG, BERKSHIRE INDUSTRIES, INC., AMERICAN-HAWAIIAN STEAMSHIP COMPANY, TRUDE WEININGER, PREMIER INVESTING CORPORATION and ROBERT KORSEN.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS TRUDE WEININGER AND PREMIER INVESTING CORPORATION IN OPPOSITION

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OPINIONS BELOW

The oral opinion of the district court dismissing the amended complaint is not reported. The unanimous opinion of the court of appeals affirming the judgment of the district court is reported at 484 F. 2d 1262 and is reproduced in the Appendix to the Petition at 1a-10a.

JURISDICTION

Petitioners invoke this Court's jurisdiction under 28 U. S. C. § 1254.

STATUTE INVOLVED

Sections 17(a) and (b) of the Investment Company Act of 1940, 15 U. S. C. §§ 80a-17(a) and (b), provide in pertinent part:

> (a) It shall be unlawful for any affiliated person . . . of . . . a registered investment company . . ., or any affiliated person of such a person, . . . acting as principal—
>
> * * *
>
> (2) knowingly to purchase from such registered company, or from any company controlled by such registered company, any security or other property (except securities of which the seller is the issuer) . . .
>
> * * *
>
> (b) Notwithstanding subsection (a) of this section, any person may file with the Commission an application for an order exempting a proposed transaction of the applicant from one or more provisions of that subsection. The Commission shall grant such application and issue such order of exemption if evidence establishes that—
>
> (1) the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned;

(2) the proposed transaction is consistent with the policy of each registered investment company concerned, as recited in its registration statement and reports filed under this subchapter; and

(3) the proposed transaction is consistent with the general purposes of this subchapter.

QUESTION PRESENTED

Did the courts below err in concluding that neither adequate "special circumstances" (Pet. 6a) nor other equitable considerations warranted the award of counsel fees in favor of petitioners from respondents Trude Weininger and Premier Investing Corporation as a consequence of the activities of petitioner Leventritt Lewittes & Bender ("LLB") in proceedings before the Securities and Exchange Commission ("SEC" or "Commission") under Section 17(b) of the Investment Company Act of 1940 ("the Act") when:

1) LLB was retained by and appeared in those proceedings on behalf of petitioners who claimed their holdings of American-Hawaiian Steamship Company ("American-Hawaiian") common stock were worth some $3.8 million;

2) The SEC has an affirmative responsibility under the Act to protect minority shareholders of registered investment companies from unfair mergers involving overreaching and petitioners neither alleged nor proved that but for LLB's efforts the SEC would have approved an unlawful merger;

3) The efforts of LLB did not develop or preserve a common fund, establish a controlling principle of law, or prove a violation of the Act or any other federal securities statute;

4) Respondents Trude Weininger and Premier Investing Corporation were separately represented by their own counsel, specifically refused to retain LLB, and, having previously sold their American-Hawaiian shares, were in a very different position vis-a-vis Berkshire than LLB's clients; and

5) Respondents Trude Weininger and Premier Investing Corporation did not receive any benefit as a consequence of LLB's efforts, were concededly prejudiced as a result of the termination of the Section 17(b) proceeding, were required to bring litigation by their own counsel in order to vindicate their rights, and paid their own counsel fees totaling $108,500 for services rendered in connection with these matters.

STATEMENT OF THE CASE

1. Introduction

Respondents Trude Weininger and Premier Investing Corporation (a closely held corporation controlled by Trude Weininger and her husband, Richard Weininger) (hereinafter sometimes collectively referred to as the "Weininger respondents") were at one time minority shareholders of American-Hawaiian. After the commencement of the SEC proceeding which is the genesis of this litigation, they sold their shares to the parent company of Berkshire Industries, Inc. ("Berkshire") pursuant to written agreements which provided for a fixed initial payment and a contingent future payment, the amount of which was tied to the decision to be rendered by the SEC in the pending proceeding. After the SEC proceeding was withdrawn prior to decision, and after the Weininger respondents' demand for additional compensation was rejected, they sued Berkshire and others to enforce their claim to receive an additional payment for the shares they previously sold. After two years of litigation

they settled their suit and received an additional payment for their shares. LLB never represented the Weininger respondents and had nothing to do with that litigation. Yet petitioners now sue the Weininger respondents claiming that LLB's representation of its own clients before the SEC justifies the award of a counsel fee of almost $1.2 million in its favor from the Weininger respondents. The courts below, applying familiar principles of equity, did not agree and dismissed the amended complaint.

2. The Proceedings before the SEC

In August 1967, respondent Berkshire, a corporation beneficially owned by respondent Daniel K. Ludwig, filed an application with the SEC under Section 17(b) of the Act for an exemption from the proscriptions of Section 17(a). Berkshire owned approximately 91% of the common stock of American-Hawaiian, a registered, closed-end investment company, and it planned to effect a statutory short form merger with American-Hawaiian in New Jersey. Because of the affiliation between Berkshire and American-Hawaiian the merger was precluded by Section 17(a) of the Act unless the SEC granted an exemption pursuant to Section 17(b).

On October 25, 1967 the SEC ordered a hearing held on the application (Administrative Proceeding File No. 3-1302), specifying the issues to be considered, including, *inter alia,*

> "Whether the terms of the proposed transaction [the Berkshire—American-Hawaiian merger], including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned."

In November 1967 and January 1968, LLB filed with the SEC notices of appearance and applications to be heard

as a participant in the hearing on the Berkshire application. Those documents state that LLB appeared for petitioners Oliver Grace et al. who owned some 4,830 shares of American-Hawaiian common stock and that LLB sought leave to be heard "as to any matter affecting the interests of the . . . [specified] stockholders." The applications were granted, and LLB took an active role in the proceedings.

The evidentiary hearing on Berkshire's application commenced on January 4, 1968 and continued on and off for 50 days through June 7, 1968. Five hundered and fifty exhibits were introduced and a 7,500 page transcript was compiled. The SEC's then Division of Corporate Regulation appeared by counsel and actively participated in the hearings. During the course of these proceedings, Berkshire raised its initial August 1967 offer of $275 per share to $375 and then to $575 per share.

Subsequent to the briefing and arguing of the issues tendered to the SEC for decision, but prior to a decision by the Commission, Berkshire sought leave to reopen the proceedings in order to produce additional evidence warranted by new developments concerning the valuation of American-Hawaiian's stock. The Commission, on June 12, 1969, ordered the hearings reopened.

Berkshire thereupon made what it deemed was a final offer of $635 per share with a contingent upward adjustment if certain construction costs were less than anticipated. Berkshire indicated to the SEC staff and LLB that if the offer was rejected the application under Section 17(b) would be withdrawn and the plan for the Berkshire—[redacted] American-Hawaiian merger would be abandoned. After consultations with only its clients (i.e., petitioners), even though it was acceptable to respondents Trude Weininger and Premier Investing Corporation, LLB rejected the offer. Berkshire thereupon filed an application to withdraw the request for a Section 17(b) exemption. LLB resisted the

withdrawal, arguing that it would be "highly prejudicial" to the minority shareholders and would constitute a "fraud" on respondents Trude Weininger and Premier Investing Corporation who had sold their shares in October 1967.[1] By an order dated November 28, 1969 (Investment Company Act Release No. 5905),[2] the SEC allowed the withdrawal. No petition to review that order was filed. The SEC did not render a decision on the valuation of the American-Hawaiian shares, and the Berkshire—American-Hawaiian merger did not occur.

3. The Pertinent Facts Concerning the Weininger Respondents

In March 1970, petitioners commenced this action in the United States District Court for the Southern District of New York, seeking attorney's fees allegedly due LLB as a consequence of its activities before the SEC. In addition to Berkshire, American-Hawaiian and Daniel K. Ludwig, plaintiffs named minority shareholder Robert Korsen and former minority shareholders Trude Weininger and Premier Investing Corporation as defendants.

Trude Weininger and Premier Investing Corporation were at one time minority shareholders of American-Hawaiian, owning 6,150 shares of common stock. Mrs. Weininger owned 5,300 shares, and Premier owned 850 shares. After the filing by Berkshire of the Section 17(b) application, and prior to LLB's appearance before the SEC, the Weininger respondents, on October 4, 1967, sold their shareholdings in American-Hawaiian to Berkshire's parent, National Bulk Carriers, pursuant to written contracts that provided for the immediate payment of $275 per share with the understanding that if any other shareholder received a

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[1] See below for the facts concerning the terms and conditions of the sale.

[2] The SEC's decision is reproduced *infra* in Appendix A.

higher price within one year or if the SEC ordered a higher price in the Section 17(b) proceeding they would receive the difference between $275 and the higher price.

During the course of the SEC hearings on Berkshire's application, petitioner Oliver R. Grace approached Richard Weininger and asked him to join the group of shareholders represented by LLB. Mr. Weininger refused the invitation and rejected any representation by LLB. Thereafter, counsel to the Weininger respondents wrote to LLB reiterating previous oral communications that it was not authorized to represent or act on behalf of Mr. or Mrs. Weininger or Premier in any connection.

After LLB rejected Berkshire's final $635 per share offer, an offer which was acceptable to the Weininger respondents, the SEC allowed Berkshire to withdraw its Section 17(b) application. As a consequence of the withdrawal, no additional payment, above the $275 per share they had previously received, was made to the Weininger respondents for their American-Hawaiian shares. Berkshire rejected the Weiningers' demand for additional compensation and instead offered to rescind the transaction. Recision was rejected by the Weiningers, and suit was commenced by them in February 1970 in federal district court against, *inter alia,* Ludwig, American-Hawaiian and Berkshire, *Weininger* v. *National Bulk Carriers,* 70 Civ. 610 (S. D. N. Y.), under the federal securities statutes for damages. The defendants answered denying liability. In the summer of 1972, after extensive discovery, the parties settled the action, the Weiningers receiving less than $635 per share. The Weininger respondents incurred counsel fees of $108,500 plus several thousands of dollars in disbursements in connection with protecting their interest in the sale of their American-Hawaiian shares to Berkshire.

These facts notwithstanding, and even though LLB conceded before the SEC that withdrawal of the Section

17(b) application would prejudice the Weininger interests, petitioners' amended complaint alleges that through the efforts of LLB the property of the Weininger respondents was preserved by some $791 per share. Petitioners pray for a $10 million counsel fee for LLB from Ludwig and/or Berkshire or American-Hawaiian. Alternatively they seek for LLB from the same defendants the sum of $2,418,262. As a further alternative, LLB alone seeks a judgment against the Weininger respondents for their pro rata share of $2,418,262, or $1,177,725 in counsel fees from the Weininger respondents, for LLB's activities before the SEC.

4. The Decisions of the Courts Below

In the district court, after extensive discovery and the filing of an amended complaint, all defendants moved for judgment dismissing petitioners' claims. Petitioners simultaneously moved for summary judgment against American-Hawaiian, introducing in support of the motion the entire record compiled before the SEC in the Section 17(b) proceeding. The district court (Hon. Whitman Knapp) determined that it would first consider defendants' motions. After oral argument, the court ruled for defendants, holding that LLB could not recover counsel fees from defendants when it did no more than voluntarily aid the SEC in the performance of the Commission's statutory obligation to protect American-Hawaiian's minority shareholders from overreaching (Pet. 13a).

Petitioners appealed to the United States Court of Appeals for the Second Circuit which unanimously affirmed the district court's judgment.[3] As the court of appeals viewed this case, the simple question for resolution was "whether the district court as a court of equity should award a fee to prevent an unjust enrichment." (Pet. 5a.) Find-

[3] A petition for rehearing or rehearing *en banc* was subseqently denied. (Pet. 11a, 12a.)

ing neither "special circumstances" nor other equitable considerations justified an award of counsel fees in this case, and finding "no precedent for such an award here and . . . considerations which would strongly militate against exercising our discretion in favor of plaintiffs here" (Pet. 6a), the court affirmed the district court's dismissal of the amended complaint.

Circuit Judge Mulligan, writing for the court, makes the following points:

A. The role of the SEC in Section 17(b) proceedings is not merely "pro forma or perfunctory". The Commission can approve the merger of a registered investment company with an affiliated company only "if *evidence* established that the consideration to be paid was reasonable and fair and did not involve overreaching." Section 17(b) proceedings are thus not the equivalent of the Commission's pro forma review, for example, of proxy materials where the vigilance of private attorneys general must be encouraged by the prospect of counsel fee awards in order to protect "the public investor who might otherwise be victimized." (Pet. 6a, 7a; emphasis in original.)

B. Since petitioners Grace et al. claimed a "direct and substantial interest" in American-Hawaiian amounting to some $3.8 million and had paid LLB $154,314 in fees, "LLB's representation was not stimulated solely by the expectation of fees from those who had not retained them." (Pet. 7a.)

C. Petitioners do not allege and it cannot be assumed that "*but for* LLB's intervention the SEC would have approved as 'fair and reasonable' the initial offer of Berkshire." The SEC, in a letter to the court of appeals, made this same point: "It is by no means clear to the Commission that but for plaintiffs' intervention . . . the Commission . . . would have sanctioned a violation of the . . . Act . . ." (Pet. 7a; emphasis in original.)

D. LLB acted as a "mere volunteer who aid[ed] a public body or trust in the performance of [its] official duties on behalf of a certain class", and it is not entitled to compensation for those actions. (Pet. 8a.)

E. The equitable basis for an award of counsel fees is the "prevention of unjust enrichment." (Pet. 8a.) To support the exercise of a court's equitable discretion to award counsel fees, a benefit must be conferred on the defendant. Such a benefit can consist either in the development or preservation of a fund; the establishment of a principle of law which others can use to their own advantage; or the establishment of a violation of law which "otherwise would have gone undetected." (Pet. 9a.) As regards the Weininger respondents, the court of appeals made the following specific observations in support of its decision that equity did not warrant an award of counsel fees to LLB from them:

> "Since the SEC proceeding was terminated here by withdrawal of the application for exemption, LLB established no violation of the Securities acts and created no fund for the benefit of the minority stockholders.
>
> The offer by Berkshire-Ludwig obviously failed to establish any market value under the circumstances and to now assess additional counsel fees upon unwilling minority stockholders who were forced to lengthy and expensive litigation to achieve any benefit, does not particularly appeal to this court of equity." (Pet. 9a-10a.)

5. Post Decision Developments

A. Subsequent to the decision of the court of appeals, in a transaction which in no way involved the Weininger

respondents, petitioners Grace et al. sold their American-Hawaiian stock to Berkshire. They paid LLB a fee of $253,800 in addition to the $154,314 previously paid. Thus, petitioners Grace et al. received more than $3.5 million for their American-Hawaiian stock, and petitioner LLB was paid a fee of more than $408,000 for its services in connection with these matters. (Pet. 4 and 8 n**.)

B. In a letter dated October 18, 1973 (Pet. 19a-23a), the SEC, while taking "no position with respect to the result reached by the Court" (Pet. 19a), requested that the last paragraph of the court's opinion be deleted because it might serve to "discourage the participation of interested persons . . . in proceedings arising under Section 17(b) . . ." (Pet. 20a.) The court, which had unsuccessfully sought the views of the SEC prior to rendering its opinion (Pet. 15a-18a), denied the Commission's request. (Pet. 24a.)

REASONS FOR DENYING THE WRIT

1. The only issue decided by the courts below was whether a "court of equity should award a fee in this case to prevent an unjust enrichment." (Pet. 5a.) No "important question of federal law" (Rule 19 of the Rules of the Supreme Court) was determined. The question of whether on the basis of the facts of this case LLB is entitled to counsel fees from respondents does not constitute a "special and important" issue (*ibid*) warranting plenary review by this Court.

The opinion of the court of appeals neither considers nor decides any issue of law under Section 17 of the Act or under any of the other federal securities statutes. The opinion below does not construe or interpret a federal statute, but merely applies well established principles of equity jurisprudence to the facts and circumstances of a

particular Section 17(b) application. The unanimous conclusion of the four judges below that after the application of familiar equitable principles to the facts of this case petitioners are not entitled to the relief they seek does not warrant further review by this Court.

2. The conclusion reached below is manifestly correct and is in accord with familiar doctrines of equity and the applicable precedents.

A. Where the protection of the rights of a class, such as stockholders, consumers, creditors, etc., are entrusted by law to a particular protector—in this case a government agency, the SEC—neither a member of the class nor his counsel may recover counsel fees from other members of the class for any action taken in any proceeding affecting the rights of the class.[4]

Here, unlike those provisions of the federal securities statutes which rely upon private litigation for effective enforcement, federal law entrusted protection of the interests of minority stockholders of American-Hawaiian to the SEC and charged the Commission with the affirmative obligation of insuring that the "consideration to be paid" them in connection with the proposed Berkshire—American-Hawaiian merger be "reasonable and fair" and involve no "overreaching" (§ 17(b)(1), 15 U. S. C. § 80a-17(b)(1)). Petitioners do not allege, and the courts cannot assume, that but for the intervention of LLB the SEC

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[4] *See generally Edison Light & Power Co.* v. *Pennsylvania Public U. Com'n.*, 34 F. Supp. 939 (E. D. Pa.), *aff'd.*, 119 F. 2d 779 (3d Cir.); *Casey* v. *Woodruff*, 49 N. Y. S. 2d 625, 647-49 (Sup. Ct. N. Y. Co.); *Thomas* v. *Peyser*, 118 F. 2d 369, 373 (D. C. Cir.); *Geiger* v. *Peyser*, 123 F. 2d 167 (D. C. Cir.). *Cf. Greene County Planning Board* v. *F. P. C.*, 455 F. 2d 412, 425-27 (2d Cir.), *cert. denied*, 409 U. S. 849.

would not have performed its statutory function.[5] While the SEC welcomes the participation of interested persons,[6] such persons appear for themselves[7] and do no more than aid the Commission in the performance of its statutory charge. In such a case, the participant is acting in his own interest and not for a class, and he is not entitled to look to other minority shareholders for counsel fees.

Having relied upon the staff of the SEC and their own counsel to protect their investment position in American-Hawaiian from Berkshire's overreaching, the Weininger respondents should not now be saddled with the fees of counsel for other investors who participated in the SEC proceeding to protect the substantial interests of their own clients.

B. In those cases in which the interests of a class are unprotected by an administrative agency, a court officer or a fiduciary, counsel fees are never allowed to one member of the class as against another member of the class who also employs counsel and whose counsel takes an active role in protecting that individual's rights. *See, e.g., Nolte* v. *Hudson,* 47 F. 2d 166, 168 (2d Cir.); *Haynes* v. *Rederi A/S Aladdin,* 362 F. 2d 345, 351 (5th Cir.), *cert. denied,* 385 U. S. 1020; *Chouest* v. *A & P Boat Rentals, Inc.,* 321 F. Supp. 1290, 1293 (E. D. La.). Here, the Weininger respondents rejected in advance representation by LLB and

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[5] *See United States* v. *Chemical Foundation,* 272 U. S. 1, 14-15 ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."); *Ross* v. *Stewart,* 227 U. S. 530, 535; 2 Davis, *Administrative Law* § 11.06 (1958).

[6] *See* Rule 9(c) of the SEC's Rules of Practice, 17 C. F. R. § 201.9(c), and the Commission's October 18, 1973 letter to the court of appeals at Pet. 20a.

[7] Rule 9(c) provides a hearing examiner may grant leave to any person "to be heard in any proceeding as to any matter *affecting his interests.*" (Emphasis supplied.)

were instead constantly represented by their own counsel. In addition to relying upon the SEC, they were protected by written contracts and by the actions of their own counsel. In the end it was their counsel's efforts in the lawsuit brought by the Weininger respondents which produced a tangible benefit. For these services the Weininger respondents paid $108,500 in counsel fees plus several additional thousands of dollars in disbursements. We submit that nothing in the federal securities statutes authorizes the imposition of an additional fee against the Weininger respondents in favor of counsel they specifically refused to retain.

C. In view of the fact that petitioners Grace et al. and the Weininger respondents were in different positions, the former having retained their American-Hawaiian shares and the latter having sold theirs in October 1967, LLB could not fairly and adequately represent both the interests of its clients and those of the Weininger respondents. The identity of interest between LLB's clients and the Weininger respondents necessary to support LLB's alleged representation of a "class" was clearly lacking.[8] Not only were the interests of LLB's clients not coextensive with those of the Weininger respondents, but the record reveals they were actually antagonistic. The record also makes it clear that LLB neither consulted with the Weininger respondents in order to ascertain their position on key issues and settlement proposals, nor acted in accordance with their wishes. In these circumstances, it was entirely appropriate for the courts below sitting as courts of equity to exercise

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[8] *See* Rules 23(a)(2) and 23(b)(3), Fed. R. Civ. P.; 3B *Moore's Federal Practice* ¶ 23.07 [2] at 23-372 and ¶ 23.07 [3] (2d ed. 1969); *Puharich* v. *Borders Electronics Co.*, 43 F. R. Serv. 2d 23a.52, Case 5 (S. D. N. Y.) ("Plaintiffs are nonselling shareholders and cannot represent selling shareholders.")

their discretion to deny petitioners' claim for counsel fees from the Weininger respondents.

D. The party seeking a counsel fee award must have conferred a substantial benefit[9] on the defendant from whom he seeks compensation, or have performed a substantial service on behalf of said defendant.[10] That result can mean either the development or preservation of a common fund for the benefit of others as well as himself, *Trustees* v. *Greenough,* 105 U. S. 527; the establishment of a claim which as a matter of law others as well as himself may enforce, *Sprague* v. *Ticonic National Bank,* 307 U. S. 161; or the establishment of a violation of federal law. *Mills* v. *Electric Auto-Lite Co., supra.* Here, however, as the court below observed, LLB created no fund, established no controlling principle of law and proved no violation of federal law. (Pet. 9a-10a.) Indeed, in some respects LLB's actions prejudiced the Weininger interests.

No American-Hawaiian shareholder received one cent above $275 per share as a result of the SEC proceeding. The SEC rendered no decision finding that a violation of federal law had occurred. The SEC proceeding did not establish any legal right of the Weininger respondents which they merely had to apply to a court to enforce. After the termination of the SEC proceeding by the Commission's grant of Berkshire's application to withdraw, the Weininger respondents were left with no American-Hawaiian shares (having sold in October 1967) and with no immediate prospect of receiving any sum above the $275 per share already paid.

The Weiningers were required to institute suit in federal district court under the anti-fraud provisions of the federal securities statutes in order to vindicate their claim

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[9] *See Schechtman* v. *Wolfson,* 244 F. 2d 537, 540 (2d Cir.).

[10] *See Mills* v. *Electric Auto-Lite Co.,* 396 U. S. 375, 396.

to additional compensation for their shares. Defendants therein were not precluded by *stare decisis, res judicata* or collateral estoppel from asserting meritorious defenses, and they did in fact defend the action with great vigor. It was not until the summer of 1972 that the case was settled and the Weininger respondents received a cash payment. LLB played no role in that litigation.

In the fall of 1969, LLB told the SEC that withdrawal of the Section 17(b) proceeding by Berkshire would be "highly prejudicial" to the Weininger interests and would amount to a "fraud" upon them. Yet in March 1970, LLB reversed itself when it commenced this litigation, alleging that it had conferred a munificent benefit upon the Weininger respondents which warranted the judicial imposition of $1,177,725 in counsel fees against them.

We submit that on this record the court of appeals was clearly correct in concluding that equity would not "now assess additional counsel fees" against the Weininger respondents. (Pet. 10a.)

3. Petitioners rely heavily on the October 18, 1973 letter from the SEC to the court below (Pet. 19a-23a), arguing in effect that it alone justifies issuance of the writ. To begin with, the SEC did not disagree with the result reached below nor with any part of the decision of the court of appeals save for the last paragraph thereof. The apprehension expressed by the Commission's counsel that three sentences in that paragraph (Pet. 20a) may discourage interested persons from participating in future Section 17(b) proceedings does not constitute an important issue of federal law which this Court should review. The SEC's letter merely questions one of the many reasons articulated by the court of appeals in explaining its decision. Furthermore, the SEC is only concerned with the practical consequences that a particular reading of that paragraph might engender.

At best this is a situation in which the SEC's concern may or may not be realized. As Circuit Judge Mulligan explained for the court in rejecting the SEC's request, the SEC merely expressed its concern that certain language in the opinion "may possibly discourage participation in some future proceedings." (Pet. 24a.) Only by awaiting the results of future experience will one be able to positively judge whether the Commission's concern was realistic. On the basis of past experience, however, we suggest the SEC is probably overly apprehensive. Here the shareholder petitioners retained counsel to aid the SEC and participate in the Section 17(b) proceeding because they held shares which they claimed were worth a minimum of $3.8 million. It was the value of their stock which prompted their participation. Their counsel's appearance was prompted by legal fees which initially amounted to some $154,000 and which finally aggregated some $408,000. Petitioners participated even though there was "no precedent" (Pet. 6a) for an award of counsel fees in a Section 17(b) proceeding. If these petitioners were not dissuaded, is it reasonable to assume that others will fail to participate before the SEC to protect their own interests? In any event, the issue is not raised by the facts of this case, and there is no warrant for this Court to review hypothetical problems.

If the SEC's apprehension proves itself to be well-founded, the appropriate solution would seem to be legislative and not judicial. (Pet. 10a.) For example, Congress could specifically authorize the Commission to award counsel fees to participants in Section 17(b) proceedings. Surely only the hearing tribunal can properly and intelligently determine what if any contribution a participant made to the ultimate result reached and whether that service should be compensible and from whom. A court can not possibly review a cold record, here a six-year old, 7,500 page tran-

script and 550 exhibits, and arrive at any reasonable judgment on an issue such as the award of counsel fees.

In a word, the SEC's missive speaks to the future and to issues of policy which ought best be left to future legislatures. The SEC's letter does not deal with the holding below—namely, that neither special circumstances nor other equitable considerations justify an award of counsel fees in this case—and, accordingly, it in no way lends support to a petition seeking this Court's review of that determination.

CONCLUSION

For all of the foregoing reasons, we urge that the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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